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# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 9

SWIFT & COMPANY, INC., AND ARMOUR AND CO.,
APPELLANTS

*v.*

DON J. WICKHAM, COMMISSIONER OF AGRICULTURE & MARKETS OF NEW YORK

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

### OPINION BELOW

The opinion of the United States District Court for the Southern District of New York (R. 376) is reported at 230 F. Supp. 398.

### JURISDICTION

The initial judgment of the three-judge district court was entered on June 12, 1964 (R. 396) and the amended judgment on July 17, 1964 (R. 397). The notice of appeal was filed on August 10, 1964 (R. 398). Appellants invoke the jurisdiction of this Court under 28 U.S.C. 1253.

## QUESTIONS PRESENTED

1. Whether New York's requirements relating to the disclosure (labeling) of weights of retail foodstuffs are unconstitutional, either under the Commerce Clause or the Fourteenth Amendment, as applied to frozen stuffed turkeys offered by appellants for sale in that State.

2. Whether the Poultry Products Inspection Act, 21 U.S.C. 451, preempted the field, precluding the application of New York's weight-labeling requirements in respect of poultry inspected under that Act.

3. Whether the Poultry Products Inspection Act, as applied to frozen stuffed turkeys, is in conflict with the application of New York Agriculture and Markets Law, § 193.3.

## STATUTES INVOLVED

The pertinent provisions of the Poultry Products Inspection Act, 21 U.S.C. 451 *et seq.*, and the New York Agriculture and Markets Law, § 193, are set forth in the appendix, *infra*, pp. 35 *et seq.*

## STATEMENT

### 1. BACKGROUND

Appellants, Swift & Co. and Armour and Co., are well known meat packing companies with a nationwide business. Both companies prepare frozen stuffed turkeys at plants in Minnesota and Wisconsin and market the birds throughout the United States in frigid form. The problem presented in this case is whether the consumer is to be advised, before her purchase, precisely how much of this item is bird and how much bread. It is on this issue which the Department of Agricul-

ture appears to differ from the State of New York.

Section 193.3 of the New York Agriculture and Markets Law provides that (emphasis added):

> All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by *net weight*, standard measure or numerical count under such regulations as may be prescribed by the commissioner.

New York State Commissioner of Agriculture and Markets Wickham has interpreted "net weight," as used in the New York statute, to require frozen stuffed turkeys offered for sale in New York to bear labels showing, separately, the weight of the turkey itself and of its stuffing, or at least giving the unstuffed weight of the bird along with the combined weight of the entire product (R. 238). Swift was convicted and fined in a court of that State for failing to comply, having offered frozen stuffed turkeys for sale in New York with labels bearing only the aggregate weight (R. 243–244). Swift did not appeal from that conviction.

The Poultry Products Inspection Act, 21 U.S.C. 451 *ff.*, requires poultry products shipped in interstate commerce to be inspected for wholesomeness by federal officials and to bear labels containing, *inter alia*, (§ 8(a) of the Act, 21 U.S.C. 457(a), emphasis added):

> [A] statement of ingredients if fabricated from two or more ingredients including a declaration as to artificial flavors, colors, or preservatives, if any, [and] the *net weight or other appropriate measure of the contents* * * *.

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Under regulations of the Secretary of Agriculture, such labels must receive prior approval by designated officials in the Department of Agriculture before they may be used. 7 C.F.R. 81.126, 81.127. Swift and Armour submitted to the Department of Agriculture sample frozen turkey labels listing the weight of the turkey and the weight of the stuffing separately and, in the case of the Swift proposal, the combined weight as well (R. 281, 287). Both labels were disapproved by the head of the Poultry Products Section of the Inspection Branch of the Poultry Division of the Department of Agriculture's Consumer and Marketing Service (formerly the Agricultural Marketing Service) (R. 167–168).

The gist of the Poultry Products Section's comments at the time of rejecting the proffered labels and in a later amplifying letter was that: (1) "The net weight shown in the manner proposed would be confusing to the consumer," (2) "it would be impossible for the consumer to verify accurately any weight other than total net weight" because "during the defrosting of the frozen stuffed turkey the natural juices from the carcass are absorbed by the dressing," (3) the turkeys would have to be weighed once before and again after stuffing and the initial weight slip might become "detached from the turkeys during the handling," resulting "in improper weights being shown on the product," (4) "double weighing" would require "the product to be at room temperature for a longer period of time" and "could permit unrestricted growth of the normal bacterial flora," and (5) the Poultry Products Inspection Act is interpreted as requiring the net weight of the

entire poultry product, *i.e.*, turkey plus stuffing, to be shown on the label (R. 279–285).

Once a turkey has been frozen it is not practicable to thaw it later in order to determine the separate weight of the stuffing in each bird (R. 233). Thus, the effect of this initial ruling by lower-echelon Agriculture officials was to prevent Swift and Armour from complying with the New York labeling requirements.

Although the Poultry Products Inspection Act,[1] as well as the Secretary's own regulations,[2] expressly afford one whose proposed label has not been approved for use the right to a full-dress administrative hearing before the Secretary of Agriculture, or his delegate, neither Swift nor Armour availed themselves of this opportunity (R. 121). Instead, after receiving the letters of disapproval from the head of the Poultry Products Section, Swift and Armour commenced the instant suit in the United States District Court for the Southern District of New York against Commissioner Wickham.

### 2. PROCEEDINGS IN THE DISTRICT COURT

In their complaint (R. 1–10), Swift and Armour requested that: (1) a three-judge district court be convened under 28 U.S.C. 2281; (2) the application of Section 193 of the New York Agriculture and Markets Law requiring them to label frozen stuffed turkeys with the separate weights of fowl and filler be declared in violation of the Commerce Clause, the

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[1] § 8(b) of the Act, 21 U.S.C. 457(b); see also 7 U.S.C. 194, 5 U.S.C. 1004, 1006 and 1007.

[2] 7 C.F.R. 81.130(c).

Supremacy Clause, and the Fourteenth Amendment to the United States Constitution; (3) the court declare that Swift, Armour and their vendees had the right to sell frozen stuffed turkeys in New York State bearing labels approved by the Department of Agriculture only; and (4) Commissioner Wickham be enjoined from interfering with their sale in New York State of frozen stuffed turkeys so labeled. A three-judge district court, comprised of Circuit Judge Friendly and District Judges Croake and Wyatt, was duly convened to try the cause (R. 41).

At the trial, William E. Hauver, Deputy Director of the Poultry Division, Consumer and Marketing Service, United States Department of Agriculture, was called as a witness by plaintiffs. Mr. Hauver testified that it was the Department's policy to permit only a single net weight to be shown on the label of any combination poultry product (R. 117). He acknowledged, however, that until the Department had disapproved the Swift and Armour labels it had permitted frozen stuffed Rock Cornish game hens[3] to be marketed with labels stating separately the weights of the Cornish hen and its stuffing (R. 117–118, 142, 145).[4] On cross-examination, he stated that the term "net weight" is defined neither in the Poultry Products Inspection Act nor in the Secretary's regulations

[3] A Rock Cornish game hen is a type of chicken, slaughtered when young and immature (5 to 6 weeks old), weighing less than two pounds ready-to-cook (eviscerated). 7 C.F.R. (1965 Cum. Supp.) 81.131(f)(1)(i).

[4] Appellants' contention that the Department of Agriculture has a "long-standing policy against multiple weight statements" (Appellants' Brief, p. 4) is thus belied by the facts.

(R. 131, 134–135). Mr. Hauver also conceded that the Department had never conducted any tests to determine whether a double-weighing process to establish separate weights was in fact feasible (R. 129–130, 150), and that, during the years when the Department permitted frozen stuffed Cornish game hens to be marketed with labels noting the weights of the bird and the stuffing separately, no complaint was received from any consumer claiming to have been confused by such labels (R. 149).

An employee of Swift testified that, under his company's present procedures, about thirty minutes elapsed between the time a turkey is placed on the assembly line until it is sent to the freezer completely stuffed, weighed and labeled (R. 80). An additional weighing, he testified, would require only one-third (⅓) of a minute more per bird (R. 81). A witness from Armour stated that their process consumed forty-five minutes per bird (R. 104), and agreed that an additional weighing would require less than half a minute per bird (R. 106). The Armour witness further testified that the additional fifteen minutes during which Armour kept the turkeys at room temperature did not affect their wholesomeness (R. 105, 106).

Both the Swift and Armour witnesses stated that a fixed amount of stuffing is not placed in each bird (R. 71, 77–78, 96); rather, each turkey is stuffed by machine until it presents an attractive appearance (R. 71, 72, 101–102). The amount forced into each carcass varies from 16% to 35% of the weight of the bird (R. 72, 76, 97–99), and there is no way in which

anyone can tell accurately from the appearance how much stuffing is contained in a given turkey (R. 75–76).

Mrs. Esther E. Hendler, an inspector of the New York City Bureau of Weights and Measures, testified that as part of her job she had purchased some frozen stuffed turkeys prepared by Swift. She recalled that one of the birds whose net weight was marked as seven pounds, four ounces, contained two pounds, two ounces of stuffing and only five pounds, two ounces of turkey (R. 243). In other words, frozen stuffing constituted 30% of her purchase.

### 3. THE DECISION BELOW

The three-judge district court dismissed the complaint. In an opinion by Circuit Judge Friendly, the court found that there could be significant variations in the weight of stuffed birds of the same size, even when the processing was done by reputable packers such as Swift and Armour, and that therefore a label showing only the combined weight might not fully inform the consumer. Noting that the New York labeling requirement was applicable to local as well as to interstate packers, did not operate to favor local competitors, afforded reasonable protection for the State's consumers, and that compliance would not be unduly burdensome on interstate commerce, the court concluded that the New York statute did not violate the Commerce Clause and rejected plaintiffs' Fourteenth Amendment argument as "patently baseless." (R. 379–380.)

Next, the district court made a careful analysis of the Poultry Products Inspection Act. It concluded that the Act was aimed at insuring the wholesomeness of fowl marketed in interstate commerce and that the provisions regarding labeling are merely incidental to the primary provisions for inspections of poultry. Thus the court held that the federal Act was not intended to preclude the States from their traditional regulation of weights and measures for the protection of local consumers. With regard to plaintiffs' claim that there was a conflict between the federal and State regulations, the court ruled that where the inconsistency hinges on a factual determination, a citizen desiring freedom from State regulations does not discharge his burden by obtaining a letter from a subordinate federal official, "at least when Congress has laid out a fact-finding procedure as to which the state could be given notice and an opportunity to be heard" (R. 390). The court concluded that it was highly unlikely that the Department of Agriculture, after a full departmental hearing, would reject New York's labeling requirement. Thus the court interpreted the Department of Agriculture's letter as rejecting only the particular labels submitted, and not all supplementary dual weight labels. (R. 381–390.)

Finally, the court considered whether this was a proper case for a three-judge court under 28 U.S.C. 2281. It concluded that, under the decision in *Kesler v. Department of Public Safety*, 369 U.S. 153, this was a borderline case. Out of an abundance of caution, the court directed that judgments be entered dismissing the complaint both in the name of the three-judge

court and in the name of District Judge Croake, the single judge who would otherwise have tried the cause and who stated he would have reached the same result independently. (R. 390–392.)

This appeal followed. The Court ordered appellee's motion to affirm the judgment below or to dismiss the appeal held in abeyance pending a hearing on the merits and invited the Solicitor General to file a brief on the merits. 379 U.S. 997. This brief for the United States as *amicus curiae* is filed in response to that invitation.

## SUMMARY OF ARGUMENT

I

New York's requirement that stuffed poultry offered for sale to consumers in that State bear labels showing separately the weight of the bird and the stuffing violates neither the Commerce Clause nor the Fourteenth Amendment. This Court has long recognized that the States have a legitimate interest in protecting their citizens against deception in the retail sale of food products. *Plumley* v. *Massachusetts*, 155 U.S. 461, 472; *Armour & Co.* v. *North Dakota*, 240 U.S. 510; *Corn Products Refining Co.* v. *Eddy*, 249 U.S. 427, 431–432; *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 143–146. The amount of stuffing in a frozen turkey varies from bird to bird and cannot be determined by the retail purchaser from the appearance of the poultry product alone (R. 75–76). Compliance with New York's non-discriminatory "dual-weight" labeling requirement would require only an additional fraction of a minute per bird (R. 81, 106); it is thus no more burdensome than

similar State requirements upheld in the past. See, *e.g., Patapsco Guano Co.* v. *North Carolina,* 171 U.S. 345; *Savage* v. *Jones,* 225 U.S. 501.

II

The provisions of the federal Poultry Products Inspection Act dealing with labeling, 21 U.S.C. 457, do not pre-empt New York's power to impose higher labeling standards for retail sale in that State. "[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably so ordained." *Florida Avocado Growers* v. *Paul,* 373 U.S. 132, 142. Neither the statutory language nor the legislative history of the Poultry Products Inspection Act reveals any congressional intention to pre-empt the traditional State regulation of weights and measures on retail food items. Rather, Congress was focusing on the discrete problem of insuring the wholesomeness of poultry during production, slaughter and interstate shipment.

Moreover, nothing in the nature of the subject matter, *i.e.,* the labeling of poultry products offered for retail sale, precludes concurrent federal and State regulation. Indeed, this Court has often upheld State laws requiring disclosure of weights and ingredients on items sold at retail within their borders which required more information than the applicable federal statutes. See, *e.g., Savage* v. *Jones,* 225 U.S.

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501; *Hebe Co.* v. *Shaw*, 248 U.S. 297; *Corn Products Refining Co.* v. *Eddy*, 249 U.S. 427.

## III

While an otherwise proper State law must yield to a valid conflicting federal regulation, we agree with the three-judge district court that the question of conflict between State and federal law is not ripe for resolution on this record. Both the Poultry Products Inspection Act and the Secretary of Agriculture's regulations call only for a disclosure of the "net weight or other appropriate measure of the contents," 21 U.S.C. 457(a); 7 C.F.R. 81.130(3). On their face at least, they do not necessarily conflict with New York's requirement. Appellants' allegation of conflict between New York law and federal regulation rests entirely on the ruling of lower-echelon Agriculture employees who summarily rejected appellants' proffer of "dual-weight" labels. Although appellants had a statutory right to a full administrative hearing (in which New York could have intervened), with review by the Secretary of Agriculture's Judicial Officer, they chose to let the matter rest after a brief exchange of correspondence with subordinate agency employees.

Sound principles of administrative law preclude appellants from asking a federal court to enjoin an otherwise valid State law on grounds of "conflict" without first obtaining an authoritative determination from the highest available administrative level that such a clash exists. See, *e.g.*, *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802;

*Public Utilities Commission* v. *United Air Lines*, 346 U.S. 402; *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481. To begin with, it is by no means certain that, after an administrative hearing at which New York can intervene and fully present its position, the agency's high level officials will agree with their subordinate employees' position. Moreover, a judicial ruling at this stage of the litigation might prejudice the public's interest in proper administration of the Poultry Products Inspection Act. The present record is confined to the material thought relevant by the litigating parties—New York and appellants. Neither the views nor the supporting evidence of the Department of Agriculture have been fully developed here. Finally, affirmance of the district court's decision will prevent premature, and perhaps wholly unnecessary, judicial resolution of complicated and delicate questions involving both technical data and federal-State relationships.

## ARGUMENT

### I.

### THE NEW YORK STATUTE REGULATING THE LABELING OF WEIGHTS AND MEASURES OF FOODSTUFFS OFFERED FOR RETAIL SALE VIOLATES NEITHER THE COMMERCE CLAUSE NOR THE FOURTEENTH AMENDMENT

We agree with the court below that New York Agriculture and Markets Law, § 193, regulating the labeling of weights on retail foodstuffs sold in New York, does not violate either the Commerce Clause or the Fourteenth Amendment. This Court has long

recognized that "the States have always possessed a legitimate interest in 'the protection of * * * [their] people against fraud and deception in the sale of food products' at retail markets within their borders." *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 144 (1963), quoting from *Plumley* v. *Massachusetts*, 155 U.S. 461, 472 (1894). In short:

> [I]t is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold. The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth. * * * [*Corn Products Ref. Co.* v. *Eddy*, 249 U.S. 427, 431–432. See also, *Armour & Co.* v. *North Dakota*, 240 U.S. 510.]

The Court has in the past rejected challenges, based on such Constitutional grounds, to similar State legislation adopted in the interest of consumers.[8] So long as the State regulation is applied

[8] See, *e.g.*, *Patapsco Guano Co.* v. *North Carolina*, 171 U.S. 345 (State legislation requiring, *inter alia*, net weight in pounds to be labeled on a commodity container); *Savage* v. *Jones*, 225 U.S. 501 (Indiana requirement that certain concentrated feed be labeled with ingredients and net weight in pounds); *Schmidinger* v. *Chicago*, 226 U.S. 578 (Chicago ordinance requiring b[illegible]d to be sold at retail only in loaves of designated pound multiples); *Armour & Co.* v. *North Dakota*, 240 U.S. 510 (State law requiring lard to be sold only in designated pound multiples); *Corn Products Refining Co.* v. *Eddy*, 249 U.S. 427 (Kansas statute requiring contents of proprietary foods to be stated on label); *Petersen Baking Co.* v. *Bryan*, 290 U.S.

evenhandedly to local and out-of-State interests alike and its incidental effect on interstate commerce is not unduly burdensome, it transgresses neither the Commerce Clause nor the Fourteenth Amendment. *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 442–444; *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 143–146.

The record before the Court leaves no doubt that the retail sale of frozen stuffed turkeys is an appropriate subject of the State's surveillance. The proportion of bread and bird in any given stuffed turkey cannot be ascertained by the consumer before purchase in the absence of such information on its label (R. 75–76). Compliance with New York's requirement that the label show separately the weight of the fowl and the filler is certainly no more burdensome than similar State labeling regulations previously upheld by the Court in *Patapsco Guano Co.* v. *North Carolina* and *Savage* v. *Jones*, *supra*, n. 5, p. 14. In fact, the record indicates that the additional weighing necessary here would require but a fraction of a minute per bird (R. 81, 106); that another company marketed frozen stuffed Cornish game hens (immature chickens) under such dual weight labels for a substantial period without apparent difficulty (R. 149–150); and that appellants themselves were fully prepared to do likewise with stuffed turkeys until approval of their "dual weight" label was withheld.

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570 (Nebraska law fixing standard size for loaf of bread); *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176 (Oregon law requiring strawberries to be sold only in hampers of a specified size).

## II.

### THE POULTRY PRODUCTS INSPECTION ACT DOES NOT PREVENT STATE REGULATION OF LABELS, WEIGHTS AND MEASURES OF SUCH ITEMS WHEN OFFERED FOR RETAIL SALE

Although regulation of the weights and measures used in retail food sales is an entirely appropriate subject for New York's police powers, Congress has included a provision in the Poultry Products Inspection Act requiring the labels of inspected poultry to disclose the "net weight or other appropriate measure of the contents." § 8 of the Act, 21 U.S.C. 457. Appellants urge that this pre-empts further regulation of such labels by New York State. We disagree. To be sure, State legislation which affects interstate commerce must yield to federal enactments which preempt the field of regulations. See, *e.g.*, *Campbell* v. *Hussey*, 368 U.S. 297. However, it will not lightly be presumed that Congress intended to occupy an entire area of the law and to exclude all State regulation touching on the same subject. "[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained." *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 142. See also, *Head* v. *New Mexico Board*, 374 U.S. 424, 429–432; *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 443–444.

Our examination of the Poultry Products Inspection Act and its legislative history persuades us, for

several reasons, that Congress did not intend this legislation to preclude State regulation of weights and measures on poultry sold at retail.

1. The Poultry Products Inspection Act contains no express prohibition against State regulation of weights, measures and labels used in connection with the retail sale of poultry products. While the pertinent provisions of the Act detail certain matters which must appear on the labels of inspected poultry products, they do not expressly preclude additional information, but only matters which are false or misleading.[6] §§ 8 (a), (b) and [9] (c), (d), (e) of the Act, 21 U.S.C. 457 (a), (b) and 458 (c), (d), (e). In fact, the labels which were approved for appellants' use on stuffed turkeys themselves contain information in addition to that required by Section 457(a), to wit, special cooking instructions (R. 38–40).

2. Nor do we think that the Act implies any such prohibition. Both the statutory language and the legislative history of the Act indicate, we believe, that Congress was focusing upon the need for nationwide federal inspection of poultry shipped in interstate commerce. The Act itself reveals that Congress recognized that a great volume of poultry products were "consumed throughout the Nation" and constituted "an important source of the Nation's total supply of food"; Congress was concerned that State inspection programs might be inadequate to keep "[u]nwholesome and adulterated poultry products [out of] * * *

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[6] See the discussion of § 18(a) of the Act, 21 U.S.C. 467, *infra*, pp. 20–23.

the channels of interstate or foreign commerce * * *." § 2 of the Act, 21 U.S.C. 451. Thus, the Act explicitly

> declared [it] to be the policy of Congress to provide for the inspection of poultry and poultry products by the inspection service as herein provided to prevent the movement in interstate or foreign commerce or in a designated major consuming area of poultry products which are unwholesome, adulterated, or otherwise unfit for human food. [§ 3 of the Act, 21 U.S.C. 452.]

Neither the legislative findings nor the declarations of policy reflect any Congressional concern with comprehensive regulation of weights and measures. Indeed, while the dozens of witnesses who testified in support of this legislation before the sponsoring House and Senate Committees were almost unanimously in favor of compulsory poultry inspection, not one suggested federal control of the labeling of weights and measures.[7]

Similarly, the congressional debates reveal Congress' concern with a problem which the States could no longer control. The poultry industry had developed in the previous half-century from a fairly local operation to one nationwide in scope, involving the interstate shipment of billions of birds annually.[8] As a result, individual State health inspection programs had proven inadequate. Much of the poultry came

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[7] See *Hearings before the Senate Committee on Agriculture and Forestry on S. 313, S. 645, and S. 1128*, 85th Cong., 1st Sess., Feb. 27 and 28, 1957; *Hearings before the Subcommittee on Poultry and Eggs of the House Committee on Agriculture*, 85th Cong., 1st Sess., March 6, 7, 8, and 15, 1957.

[8] See 103 Cong. Rec. 5228, 5239–40, 11,114–15, 11,121–23.

from plants beyond the borders of the State where sold, so that the State of sale could inspect neither the birds' freedom from disease before slaughter nor the santitary conditions of the slaughter houses.[9] Moreover, a federal program of voluntary inspection was successful in reaching less than thirty per cent of the poultry consumed annually.[10] The Poultry Products Inspection Act was thus primarily designed to close this serious gap in the nation's health laws. Nowhere in the debates, the committee reports, or the hearings was any suggestion made that State regulation of weights and measures on labels was inadequate, much less that this traditional area of State concern was to be pre-empted by the proposed legislation.[11]

We therefore submit that Section 8(a) of the Act (21 U.S.C. 457(a))—which requires, *inter alia*, "net weight" labels on inspected poultry products—was merely intended to "round * * * out" the Act's principal purpose of providing a mandatory nationwide inspection service to insure the wholesomeness

[9] See 103 Cong. Rec. 5237, 11,115, 11,718.

[10] See 103 Cong. Rec. 5239, 11,117–20, 11,123.

[11] Thus the situation here is totally unlike that in *Campbell v. Hussey*, 368 U.S. 297, where the statutory language and the legislative history of the Federal Tobacco Inspection Act revealed a congressional intent to establish a single national standard of tobacco labeling which pre-empted State regulation. The Tobacco Act expressly stated that its purpose was to create "uniform standards of [tobacco] classification" which would be "the official standards of the United States." 7 U.S.C. 511a, b.

Nor does *Rice v. Santa Fe Elevator Corp*, 331 U.S. 218, assist appellants. The Court based its holding in that case on the United States Warehouse Act's "unequivocal" legislative history. 331 U.S. at 233–235.

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of poultry. H. Rep. No. 465, 85th Cong., 1st Sess., p. 1. As the lower court phrased its conclusion, the Act's "provisions as to labelling * * * are *merely incidental* to the primary provisions for inspection of poultry products." (R. 386, emphasis added.) There was thus no manifest congressional purpose to strip the States of their traditional power to protect their consumers through regulation of weights and measures on the labels of goods sold in the State. Cf., *Florida Avocado Growers* v. *Paul*, 373, U.S. 132, 145; 103 Cong. Rec. 5237–5238 (remarks of Senator Holland).

3. The Poultry Products Inspection Act provisions relating to labeling are similar to those contained in the Federal Food, Drug, and Cosmetic Act. 21 U.S.C. 321(k), (l), (m), and 331 (a), (b), (i), (k). This Court has consistently held that the Food, Drug, and Cosmetic Act did not preempt State regulation of labels and has upheld State laws requiring disclosure of weights and ingredients on items sold at retail within their borders, which went further and required more information than the applicable Federal Food, Drug, and Cosmetic Act. *Savage* v. *Jones*, 225 U.S. 501; *Armour & Co.* v. *North Dakota*, 240 U.S. 510; *Hebe Co.* v. *Shaw*, 248 U.S. 297; *Corn Products Refining Co.* v. *Eddy*, 249 U.S. 427.[12] In the circumstances,

[12] *McDermott* v. *Wisconsin*, 228 U.S. 115, is not contrary. There, State regulations would have required removal of a federally approved label and were for that reason disapproved. The right to require information on the label in addition to that furnished under the federal Act was specifically upheld in the subsequent case of *Corn Products Refining Co.* v. *Eddy*, 249 U.S. 427.

it seems unlikely that Congress intended parallel legislation to pre-empt State regulation without expressly so stating. Cf., *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176; *Florida Avocado Growers* v. *Paul*, 373 U.S. 132.

To be sure, Section 18(a) of the Poultry Products Inspection Act does provide that (21 U.S.C. 467(a)):

> For the purpose of preventing and eliminating burdens on interstate commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this Act shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act, as amended, to the extent of the application or the extension thereto of the provisions of this chapter.

This provision and similar comments in the legislative history must be understood, however, in light of the underlying purposes of the Act, *i.e.*, the establishment of requisite standards for preparing and packaging poultry prior to its shipment in interstate commerce.[12a] The Act here in question is closely analogous, in this respect, to that considered in *Florida Avocado Growers* v. *Paul*, 373 U.S. 132. In that case the Court held that the Secretary of Agriculture's authority to set standards governing the type of avocados that qualified for interstate shipment did not prevent California from imposing higher standards for avocados sold at retail in that State in order to

[12a] Compare 103 Cong. Rec. 5,237–5,238 (Remarks of Senator Holland) with 103 Cong. Rec. 15,170 (Remarks of Senator Humphrey).

protect its own citizens. 373 U.S. at 144–145. It stated that "[c]ongressional regulation of one end of the stream of commerce [here production, slaughter and interstate shipment of fowl] does not, *ipso facto*, oust all state regulation at the other end [here, as in *Florida Avocado*, food retailing]." *Id.* at 145.

Our views also find confirmation in the committee reports, which state that Section 18(a) was meant to "provide * * * the same exemption for poultry and poultry products from the Food, Drug, and Cosmetic Act as presently applies to red meats"[13] under the Meat Inspection Act. That Act, like the Poultry Products Inspection Act, requires inspected meat products to be wholesome and bear approved labels before shipment in interstate commerce. 21 U.S.C. 71–79. However, after the interstate meat shipment has been completed, the Food, Drug, and Cosmetic Act applies. *United States* v. *Kocmond*, 200 F. 2d 370 (C.A. 7), certiorari denied, 345 U.S. 924.[14] Of course, once the Food, Drug, and Cosmetic Act applies to the meat, the State where retail sale takes place is free to require additional label disclosures. See cases cited, *supra*, p. 20. Therefore if Section 18(a) of the Poultry Products Inspection Act, 21 U.S.C. 467(a), gives the Secretary of Agriculture only the same exclusivity of jurisdiction as he enjoys under the Meat Inspection Act, the statute does not preclude the State

[13] S. Rep. No. 195, 85th Cong., 1st Sess., p. 6; H. Rep. No. 465, 85th Cong., 1st Sess., pp. 6–7.

[14] This case upheld a conviction under the Food, Drug, and Cosmetic Act of a meat packer who removed federal inspection stamps affixed under the Meat Inspection Act and attempted to sell horse meat as beef.

where the poultry is retailed from requiring more comprehensive label disclosures.

4. Finally, nothing in the nature of the subject matter being regulated—disclosure of net weights on the labels of poultry for retail sale—requires a uniform national standard. "On the contrary, [this] * * * is a subject matter of the kind this Court has traditionally regarded as properly within the scope of state superintendence." *Florida Avocado Growers* v. *Paul,* 373 U.S. 132, 144. Indeed, much poultry is now disjointed after its arrival at the retail store and sold in parts. The correct labeling of weights upon items sold under such conditions seems an inherently unlikely matter for exclusive federal concern. We observe nothing in the poultry retailing industry sufficient to distinguish it from other branches of the retail food industry. See, *e.g., Florida Avocado Growers* v. *Paul, supra; Cloverleaf Co.* v. *Patterson,* 315 U.S. 148, 162; *Savage* v. *Jones,* 225 U.S. 501; *Hebe Co.* v. *Shaw,* 248 U.S. 297; *Armour & Co.* v. *North Dakota,* 240 U.S. 510; *Corn Products Refining Co.* v. *Eddy,* 249 U.S. 427; *Pacific States Box & Basket Co.* v. *White,* 296 U.S. 176; cf., *Huron Cement Co.* v. *Detroit,* 362 U.S. 440; *Head* v. *New Mexico Board,* 374 U.S. 424.

Moreover, the Poultry Products Inspection Act does not blanket the entire poultry industry. Intrastate shipments of poultry, unless made in a specially designated major consumption area, are not covered. §§ 5, 6 of the Act, 21 U.S.C. 454, 455. In addition, certain types of poultry dealers may be exempted from regulation. § 15 of the Act, 21 U.S.C. 464. Thus, the Act

would, in no event, provide a uniform standard of labeling for all poultry products.

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In sum, we submit that in enacting the labeling provisions of the Poultry Products Inspection Act, Congress was prescribing standards to be met for the shipment of the commodity in interstate commerce. It was not focusing upon the other end of the stream of commerce—the distribution of poultry products to the local retail consumer. At least so far as regards the regulation of retail weights and measures, the absence of a clear statutory prohibition against concurrent State regulation, the complete absence from the legislative history of any statement in favor of uniform nationwide label regulation, and the inherent unsuitability of the subject matter for uniform national regulation, all lead us to conclude that the Act did not withdraw the States' traditional power to set higher standards for the protection of consumers.

While we have thus concluded that there is no *inherent* reason why the Poultry Products Inspection Act should preclude New York State's regulation of retail weights and measures, we recognize the apparent conflict between the New York requirements and the federal Act *as applied* to the labeling of frozen stuffed turkeys in this case. We therefore turn now to that more limited question: whether the New York legislation must give way to the particular application of the federal Act presented in this case.

## III.

### WHETHER THERE IS A CONFLICT BETWEEN FEDERAL AND NEW YORK LAW TO WHICH THE NEW YORK REGULATION MUST YIELD IS NOT RIPE FOR DECISION ON THIS RECORD

Because of their nature, if frozen stuffed turkeys are to bear labels detailing their weights both stuffed and unstuffed, that information must be ascertained and affixed at the time the poultry product is prepared and frozen. After the frozen turkey is received at the retail market it is not practical to thaw it, determine the weight of its components, and refreeze it. The Agriculture Department insists, as it has a right to do, that no inspected poultry product be shipped in interstate commerce unless it bears a label approved by the Department. Therefore, should the Secretary of Agriculture bar the use of any "dual weight" label, plaintiffs would as a practical matter be unable to comply with New York's labeling requirements, and it might well be necessary for the New York law to give way. *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 142–143; *McDermott* v. *Wisconsin*, 228 U.S. 115, 137. However, we agree with the district court that the question of conflicting applications of State and federal law is not ripe for resolution on this record (R. 389–390).

Although the New York definition of "net weight" as applied to frozen stuffed turkeys is adequately demonstrated in the record, it is by no means established that the Secretary of Agriculture has made a conflicting determination as to the requirements im-

posed by similar language in the federal Act. The Poultry Products Inspection Act itself merely requires that an inspected bird be labeled with its "net weight or other appropriate measure of the contents * * *." § 8(a) of the Act, 21 U.S.C. 457(a). The Secretary's regulations, helpful in spelling out other facets of the Act's labelling requirements (see 7 C.F.R. 81.125–81.156), do not speak to the problem in question, *i.e.*, whether a dual-weight label is prohibited (R. 131, 134–135). Appellants' claim of conflict rests only upon comments by subordinate Agriculture officials.

Swift and Armour, however, had a statutory right to obtain a full administrative hearing, merely by filing a simple request. § 8(b) of the Act, 21 U.S.C. 457(b). In that event, a hearing examiner could have taken evidence from all interested parties (including Swift, Armour, the Department of Agriculture's investigators and the State of New York), found the facts and promulgated conclusions. 5 U.S.C. 1004, 1006, 1007. Upon request of any participant the propriety of appellants' dual-weight labels would then have been reviewed by the Judicial Officer of the Department of Agriculture, who is immediately under the Secretary of Agriculture in authority. 10 Fed. Reg. 13,769; 11 Fed. Reg. 177A-233; 18 Fed. Reg. 3219, 3648; 5 U.S.C. 516b.

For reasons sufficient to themselves, however, appellants chose to let the matter rest after a brief exchange of correspondence with subordinate Agriculture employees. Appellants' answer is that they have "accepted" the low-level administrative determination

disapproving their use of dual-weight labels. We submit, however, that sound principles of administrative law preclude Swift and Armour from asking a federal court to enjoin an otherwise valid State law on the ground of conflict with federal administrative regulations without having first obtained an authoritative interpretation of those regulations at the highest available administrative level. Regardless of whether Swift and Armour are willing to waive any further administrative review, a full exhaustion of administrative remedies is a prerequisite either to invoking the federal regulation against the State of New York or to testing the validity of the administrative ruling in the courts.[18] Our reasons for this view are threefold:

*First*, it would protect the State of New York's legitimate interest in not having its laws enjoined unless and until there is in fact a clear and irreconcilable conflict with a federal statute or regulation. It cannot now be predicted with assurance whether, upon consideration of a full record developed in the administrative hearing which Congress has explicitly made available and in which New York may intervene and

[18] If Swift and Armour, without obtaining any ruling whatsoever from the Department of Agriculture, had asked the district court to enjoin New York's dual-weight requirement as conflicting with federal law, the court would undoubtedly have declined to issue an injunction. The courts will not speculate on whether the Secretary of Agriculture would interpret the federal requirement of "net weight" as precluding a dual-weight label. The present record does not offer the Court any surer guess as to the position the Department of Agriculture will ultimately adopt when called upon to rule in the context of a full record.

present evidence, the Secretary of Agriculture's top-level delegate will agree with the conclusion reached by his subordinate. Indeed, so far as the record discloses, the Agriculture employee who rejected appellants' proffered dual-weight labels was not at that time aware that New York required a dual-weight disclosure (R. 283–284). In the quasi-judicial hearing which Swift and Armour could so easily have initiated, the Secretary of Agriculture's delegate would undoubtedly have accorded appropriate weight to New York's position. See § 18(b) of the Act, 21 U.S.C. 467(b), encouraging cooperation between the Secretary of Agriculture and State agencies, and § 8(a) of the Act, 21 U.S.C. 457(a), permitting the Secretary of Agriculture to allow reasonable variations and grant exemptions from the Act's labeling requirements.

Since Swift and Armour chose not to pursue the question of dual weight labeling within the Department of Agriculture, but instead initiated this action in a federal district court for an injunction against the State of New York, we are unable to state with any degree of certainty whether the Department of Agriculture's ultimate ruling would have conflicted with New York law. Accordingly, we believe that Swift and Armour, having failed to exhaust the administrative avenues open to them, cannot rely on the ruling of a subordinate Agriculture employee as creating a sufficient conflict to enjoin the enforcement of New York's otherwise valid law.

*Second,* a ruling on the merits in the present posture of the instant case may well prejudice the legiti-

mate interests of the public in the proper administration of the Poultry Products Inspection Act. The record is confined to the material thought relevant to the litigating positions of Swift and Armour on one hand and the State of New York on the other. The views of the Department of Agriculture have not been fully developed. They are represented by a single letter and two short comments from subordinate officials, together with the testimony of one witness, elicited during examination and cross-examination by counsel primarily interested in supporting their clients' partisan positions. Other grounds which might justify the denial of dual-weight labels may well be unexpressed in the record. Requiring the plaintiffs to obtain a ruling from the highest available administrative level before asking for an injunction against a purportedly conflicting State regulation would insure that rulings of federal administrative agencies will not be judicially reviewed until the agency has brought its full resources to bear on the problem and made a complete record.

*Finally,* the district court's decision prevents premature and perhaps wholly unnecessary judicial resolution of serious and difficult questions involving both technical data and delicate federal-State relationships.

On more than one occasion this Court has refused to short-circuit the administrative process where private parties, faced with apparently conflicting demands of State and federal administrative agencies, prematurely requested judicial relief. See, *e.g., Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802, reversing *per curiam*, 156 F. 2d

821 (C.A.D.C.); *Public Utilities Commission* v. *United Air Lines*, 346 U.S. 402; see also *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237; *Whitney Nat'l Bank* v. *Bank of New Orleans*, 379 U.S. 411.

The *Arkansas Power & Light* case is particularly apposite here. The Arkansas Public Service Commission had ordered the power company to keep its principal set of books in a certain manner. The staff of the Federal Power Commission asserted that the power company should keep its principal set of books in a different manner, and the Federal Power Commission issued an order to show cause why the company should not comply. Instead of attending the FPC hearing which it was entitled to receive, the power company immediately brought suit against both the FPC and the State Commission and asked the federal district court to decide which agency it should obey. In its responsive pleadings, the FPC asserted its exclusive jurisdiction to regulate the power company's bookkeeping, but argued that the federal courts should not yet enter the controversy because the FPC had not held hearings and reached a final conclusion at its highest administrative level. This Court, reversing the court of appeals, held, *per curiam*, that the Arkansas Power Company's complaint should have been dismissed "on the ground that [it] has failed to exhaust its administrative remedies." 330 U.S. 802. Both the appellants in the instant case and the plaintiff in *Arkansas Power* had one paramount interest: to avoid subjection to conflicting State and federal regulations. In both cases they attempted to circumvent the administrative decisional process by

going to court rather than permitting the federal agency to hold a hearing, take evidence, and exercise its collective expertise at a high administrative level. And here, as in that case, they should be relegated to their administrative remedies first.

These cases are bottomed on the basic principle that when Congress creates an administrative agency with expertise in a given area, the courts should not be the first to pass on subjects within the agency's ken. Rather, they should refrain until the agency has brought its expertise to bear on the particular problem by "mak[ing] a preliminary, comprehensive investigation of all the facts, analyz[ing] them, and appl[ying] to them the statutory scheme as it is construed." The courts thus "avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern." *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 498. See also, *e.g.*, *Far East Conference* v. *United States*, 342 U.S. 570, 574–575; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 384.

This Court has warned that a court "usurps the agency's function [if it] * * * deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 155.[16] Accordingly, in *United*

[16] With regard to an agency's fact finding authority, Mr. Justice Holmes, speaking for the Court, has stated that "before the courts can be called upon, the preliminary sifting process

*States* v. *Ruzicka*, 329 U.S. 287, this Court refused to permit judicial review of the validity of a preliminary determination by the Department of Agriculture; instead the Court postponed all form of judicial review until the Secretary of Agriculture could hold a hearing, make a final determination of policy, and set forth his reasoning:

> Even when [questions as to the validity of the agency's determinations] are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. *It is on the basis of his ruling, and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts.* * * * [329 U.S. at 294, emphasis added.]

A ruling on the merits of the instant case at this time would frustrate this basic principle. The Department of Agriculture has conducted no hearings, taken no testimony and initiated no tests. In short, it has made no record whatsoever. This can hardly be said to satisfy the elementary principle that the

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provided by the statutes must be gone through with." *United States* v. *Sing Tuck*, 194 U.S. 161, 170. And regarding the agency's scope in policy matters, the Court has written:

"* * * where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. * * * [The agency's] determination * * * is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131.

courts should not pass on such matters without first "permit[ting] agency expertise to be brought to bear." *Whitney Nat'l. Bank* v. *Bank of New Orleans*, 379 U.S. 411, 420. Indeed, the district court proceedings in the instant case demonstrate that judicial review at this stage would be premature. Here, as in *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540, 545, "the administrative process, far from being exhausted, had hardly begun."

We therefore agree with the unanimous decision of the three-judge district court that Swift and Armour are not entitled to equitable relief at this time.[17] We respectfully submit that the Court should not decide, on the basis of the present record, whether there is an unavoidable and irreconcilable conflict between federal and New York law. If the decision of the lower court is affirmed, Swift and Armour may submit dual-weight labels to the Department of Agriculture and, if rejected, request the administrative hearing afforded by statute. The State of New York may then intervene to present its views and evidence. In this manner the Secretary of Agriculture's highest delegate will be enabled to collect and marshal the facts and make the policy judgments entrusted to the Secretary of Agriculture by Congress, subject to judicial review.[18]

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[17] Whether Swift and Armour would be entitled to a temporary injunction during the pendency of a hearing before the Department of Agriculture need not be decided as they have never requested interim relief.

[18] Of course, it would be appropriate for private parties such as Swift and Armour, on the one hand, to inform the Department of Agriculture officials who are reviewing their requests

## CONCLUSION

For the reasons stated, we submit that the decision below should be affirmed on the grounds that: (1) the New York Regulation is a permissible exercise of that State's police powers and does not unreasonably burden interstate commerce; (2) the Poultry Products Inspection Act does not preempt State regulation of the labeling of the weights and measures of poultry offered for retail sale; and (3) on the basis of the present record and because of plaintiffs' failure to obtain a ruling from the highest available administrative level, the Court cannot now determine whether New York's regulation must give way because of a valid, conflicting application of the federal Act.

Respectfully submitted.

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of the potential conflict with State law and, on the other hand, to notify the State of the existence of the Department of Agriculture proceeding so that it may intervene. See Appellants' Brief, pp. 25–26. Whether such an obviously desirable procedure by the private applicant is a necessary prerequisite to affirmative use of the administrative ruling as a basis for injunctive relief against a State need not be decided at this time.

# APPENDIX

The pertinent provisions of the Poultry Products Inspection Act, 71 Stat. 441, as amended, 21 U.S.C. 451 *et seq.*, provide:

## LEGISLATIVE FINDING

SEC. 2. [21 U.S.C. 451] Wholesome poultry products are an important source of the Nation's total supply of food. Such products are consumed throughout the Nation and substantial quantities thereof move in interstate and foreign commerce. Unwholesome and adulterated poultry products in the channels of interstate or foreign commerce, are injurious to the public welfare, adversely affect the marketing of wholesome poultry products, result in sundry losses to producers, and destroy markets for wholesome poultry products. The marketing of wholesome poultry products is affected with the public interest and directly affects the welfare of the people. All poultry and poultry products which have or are required to have inspection under this Act are either in the current of interstate or foreign commerce or directly affect such commerce. That part that enters directly into the current of interstate or foreign commerce cannot be effectively inspected and regulated without also inspecting and regulating all poultry and poultry products processed or handled in the same establishment.

The great volume of poultry products required as an article of food for the inhabitants of large centers of population may directly affect the movement of poultry and poultry products in interstate commerce. To protect interstate commerce in poultry and poultry products inspected for wholesomeness, from being

adversely burdened, obstructed, or affected by uninspected poultry or poultry products, major consuming areas where poultry or poultry products are handled or consumed in such volume as to affect the movement of inspected poultry or poultry products in interstate commerce should be designated by the Secretary pursuant to the provisions of this Act.

DECLARATION OF POLICY

SEC. 3. [21 U.S.C. 452]. It is declared to be the policy of Congress to provide for the inspection of poultry and poultry products by the inspection service as herein provided to prevent the movement in interstate or foreign commerce or in a designated major consuming area of poultry products which are unwholesome, adulterated, or otherwise unfit for human food.

DEFINITIONS

SEC. 4. [21 U.S.C. 453] For purposes of this Act—

* * * * *

(n) The term "label" means any written, printed, or graphic material upon the shipping container, if any, or upon the immediate container, including but not limited to an individual consumer package, of the poultry product, or accompanying such product.

* * * * *

DESIGNATION

SEC. 5. [21 U.S.C. 454] Upon application by an appropriate State or local official or agency of a substantial portion of any major consuming area or upon application by an appropriate local poultry industry group in such area, where the Secretary has reason to believe that poultry or poultry products are handled or consumed in such volume as to affect, burden, or obstruct the movement of inspected poultry

products in interstate commerce, the Secretary shall conduct a public hearing to ascertain whether or not it will tend to effectuate the purposes of this Act for such area to be subject to the provisions of this Act. If after public hearing the Secretary finds that poultry or poultry products are handled or consumed in such volume as to affect, burden, or obstruct the movement of inspected poultry products in commerce and that the designation of such area will tend to effectuate the purposes of this Act, he shall by order designate such area and prescribe the provisions of this Act which shall be applicable thereto and grant such exemptions therefrom as he determines practicable. Such designation shall not become effective until six months after the notice thereof is published in the Federal Register. On and after the effective date of such designation, all poultry and poultry products processed, sold, received, or delivered in any such area shall be subject to the provisions of this Act.

ANTE MORTEM AND POST MORTEM INSPECTION, REINSPECTION, AND QUARANTINE

SEC. 6. [21 U.S.C. 455] (a) For the purpose of preventing the entry into or flow or movement in commerce or a designated major consuming area of any poultry product which is unwholesome or adulterated, the Secretary shall, where and to the extent considered by him necessary, cause to be made by inspectors ante mortem inspection of poultry in any official establishment processing poultry or poultry products for commerce or in, or for marketing in a designated city or area.

(b) The Secretary, whenever processing operations are being conducted, shall cause to be made by inspectors post mortem inspection of the carcass of each bird processed, and at any time such quarantine, segregation, reinspection as he deems necessary of poultry and poultry

products in each official establishment processing such poultry or poultry products for commerce or in, or for marketing in a designated city or area.

(c) All poultry carcasses and parts thereof and poultry products found to be unwholesome or adulterated shall be condemned and shall, if no appeal be taken from such determination of condemnation, be destroyed for human food purposes under the supervision of an inspector: *Provided,* That carcasses, parts, and products, which may by reprocessing be made not unwholesome and not adulterated, need not be so condemned and destroyed if so reprocessed under the supervision of an inspector and thereafter found to be not unwholesome and not adulterated. If an appeal be taken from such determination, the carcasses, parts, or products shall be appropriately marked and segregated pending completion of an appeal inspection, which appeal shall be at the cost of the appellant if the Secretary determines that the appeal is frivolous. If the determination of condemnation is sustained the carcasses, parts, and products shall be destroyed for human food purposes under the supervision of an inspector.

* * * * * *

LABELING

SEC. 8. [21 U.S.C. 457] (a) Each shipping container of any poultry product inspected under the authority of this Act and found to be wholesome and not adulterated, shall at the time such product leaves the official establishment bear, in distinctly legible form, the official inspection mark and the approved plant number of the official establishment in which the contents were processed. Each immediate container of any poultry product inspected under the authority of this Act and found to be wholesome and not adulterated shall at the time

such product leaves the official establishment bear, in addition to the official inspection mark, in distinctly legible form, the name of the product, a statement of ingredients if fabricated from two or more ingredients including a declaration as to artificial flavors, colors, or preservatives, if any, the net weight or other appropriate measure of the contents, the name and address of the processor and the approved plant number of the official establishment in which the contents were processed. The name and address of the distributor may be used in lieu of the name and address of the processor if the approved plant number is used to identify the official establishment in which the poultry product was prepared and packed. The Secretary may permit reasonable variations and grant exemptions from the foregoing labeling requirements in any manner not in conflict with the purposes of this Act.

(b) The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this Act or the container thereof which is false or misleading in any particular is prohibited. No poultry products inspected or required to be inspected pursuant to the provisions of this Act shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept

the determination of the Secretary, he may request a hearing, but the use of the label shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless within thirty days after the receipt of notice of such final determination the person adversely affected thereby appeals to the United States court of appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 204 of the Packers and Stockyards Act of 1921, as amended, shall be applicable to appeals taken under this section.

PROHIBITED ACTS

SEC. 9. [21 U.S.C. 458] The following acts or the causing thereof are hereby prohibited:

* * * * *

(c) Falsely making or issuing, altering, forging, simulating, or counterfeiting any official inspection certificate, memorandum, mark or other identification, or device for making such mark or identification, used in connection with the inspection of poultry or poultry products under this Act, or causing, procuring, aiding, assisting in, or being a party to, such false making, issuing, altering, forging, simulating, or counterfeiting, or knowingly possessing, without promptly notifying the Secretary of Agriculture or his representative, uttering, publishing, or using as true, or causing to be uttered, published, or used as true, any such falsely made or issued, altered, forged, simulated, or counterfeited official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, or representing that any poultry or poultry product has been officially inspected

under the authority of this Act when such poultry or poultry product has in fact not been so inspected.

(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product.

* * * * *

COMPLETE COVERAGE OF OFFICIAL ESTABLISHMENTS

SEC. 10. [21 U.S.C. 459] No establishment processing poultry or poultry products for commerce or in or for marketing in a designated major consuming area shall process any poultry or poultry product except in compliance with the requirements of this Act.

EXEMPTIONS

SEC. 15. [21 U.S.C. 464] (a) The Secretary shall, by regulation and under such conditions as to sanitary standards, practices, and procedures as he may prescribe, exempt from specific provisions of this Act—

(1) poultry producers with respect to poultry of their own raising on their own farms which they sell directly to household consumers or restaurants, hotels, and boarding houses for use in their own dining rooms or in the preparation of meals for sales direct to consumers only: *Provided,* That such poultry producers do not engage in buying or selling poultry products other than those produced from poultry raised on their own farms;

(2) retail dealers with respect to poultry products sold directly to consumers in individual retail stores, if the only processing operation performed by such retail dealers is the cutting up of poultry products on the premises where such sales to consumers are made;

(3) for such period of time as the Secretary determines that it would be impracticable to provide inspection and the exemption will

aid in the effective administration of this Act, any person engaged in the processing of poultry or poultry products for commerce and the poultry or poultry products processed by such person: *Provided, however,* That no such exemption shall continue in effect on and after July 1, 1960; and

(4) persons slaughtering, processing, or otherwise handling poultry or poultry products which have been or are to be processed as required by recognized religious dietary laws, to the extent that the Secretary determines necessary to avoid conflict with such requirements while still effectuating the purposes of this Act.

(b) The Secretary may by order suspend or terminate any exemption under this section with respect to any person whenever he finds that such action will aid in effectuating the purposes of this Act.

GENERAL PROVISIONS

SEC. 18. [21 U.S.C. 467] (a) For the purpose of preventing and eliminating burdens on commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this Act shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act, as amended, to the extent of the application or the extension thereto of the provisions of this Act.

(b) In carrying out the provisions of this Act, the Secretary may cooperate with other branches of Government and with State agencies and may conduct such examinations, investigations, and inspections as he determines practicable through any officer or employee of a State commissioned by the Secretary for such purpose.

New York State Agriculture and Markets Law, Section 193 (McKinney's Consolidated Laws of New York Annotated, Book 2-8, Cumulative Pocket Pt., 1964), provides:

METHOD OF SALE OF FOOD AND FOOD PRODUCTS

1. Definition of "food" and "food product". The terms "food" and "food product" as used in this section shall include all material, solid, liquid or mixed, whether simple or compound, used or intended for consumption by human beings or domestic animals normally kept as household pets and shall also include all substances or ingredients to be added thereto for any purpose.

2. All food and food products which are sold, offered or exposed for sale by wholesalers, packers, distributors or jobbers shall be sold or offered for sale by net weight, numerical count or standard measure, whichever term shall be applicable, and shall be plainly marked by such person or persons offering the food or food products for sale, in such form or manner as may be prescribed by the commissioner, except that it shall not be necessary to so mark meat, meat products or fish, except shellfish in natural form, provided the net weight be stated on a written invoice and on the shipping container of the meat, meat product or fish.

3. All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the commissioner.

4. All food and food products which are packaged or wrapped by the retailer in advance of being exposed or offered for sale by the retailer shall be accurately marked in such form or manner as may be prescribed by the commissioner, with (a) the net weight or standard measure or numerical count; (b) the selling price per pound or unit of standard measure, and (c) the total selling price.

5. Wherever food or food products are packaged or wrapped for sale by a retailer in advance of being sold or offered for sale, an accurate computing scale shall be maintained so placed as to be easily available to customers.

6. This section shall not apply to sales of (a) eggs, fresh fruits, fresh vegetables, grains and nuts; (b) milk and cream as set forth in section one hundred ninety-one of this chapter; (c) malt beverages as set forth in section one hundred ninety-two-c of this chapter; (d) bread, as set forth in section one hundred ninety-three-a of this chapter; (e) frozen desserts as set forth in section one hundred ninety-three-d of this chapter; (f) alcoholic beverages; and (g) drugs and pharmaceuticals.

U.S. GOVERNMENT PRINTING OFFICE: 1969

In the

# Court of the United States

OCTOBER TERM, 1965

No. 9

[illegible], INC., and ARMOUR AND COMPANY,

Appellants,

v.

[illegible], Commissioner of Agriculture and Markets of the State of New York,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## APPELLEE'S BRIEF


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